No. 89-187

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JACK McCORMICK, Warden of the Montana State Prison, and MARC RACICOT, Attorney General of the State of Montana,

Petitioners,

v.

DEWEY E. COLEMAN,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HENRY T. GREELY
Stanford Law School
Stanford, CA 94305
(415) 723-2517

*TIMOTHY K. FORD
MacDonald, Hoague & Bayless
1500 Hoge Building
Seattle, WA 98104
(206) 622-1604

CHARLES F. MOSES
Moses Law Firm
300 N. 25th Street, Penthouse
Billings, MT 59103

ATTORNEYS FOR RESPONDENT

*Counsel of Record

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in its unanimous conclusion that a capital defendant "is due at least that amount of process which enables him to put on a defense during trial knowing what effect such a strategy would have on subsequent capital sentencing"?

2. Can the State argue for the first time in this Court that this legal principle is a "new" constitutional rule which should not be retroactive to this case?

3. Is this a "new rule" of federal constitutional law?

4. Can a violation of this due process principle, which has caused defense counsel in a capital case to try the case without knowing the sentencing implications of any of his decisions and actions before or during trial, be held to be harmless error?

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Respondent Dewey Coleman respectfully submits that the Court should not issue a writ of certiorari to review this case.

STATEMENT OF THE CASE

Petitioner's recitation of the facts and procedural history of this case does not give a fully balanced view of the record on which the Court of Appeals rendered its decision below.[1]

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[1]The disturbing facts of this case produced several sharply divided decisions from the Montana Supreme Court. See State v. Coleman, 605 P.2d 1000 (Mont. 1979) (affirming death sentence, one Justice dissenting); Coleman v. State, 633 P.2d 624 (Mont. 1981) (denying postconviction relief, two Justices dissenting); Coleman v. Risley, 663 P.2d 1154 (Mont. 1983) (denying habeas corpus relief, three Justices dissenting).

Respondent Dewey Coleman, a black man with no criminal record, and Robert Nank, a white man with a criminal record and a history of violence, were arrested in 1974 and charged with the kidnaping and murder of a young white woman named Peggy Harstad, near Forsyth in eastern Montana. At the time of the arrest Montana had a mandatory death sentence for the crime of aggravated kidnaping resulting in the death of the victim.

In early May 1975, Mr. Nank made a plea bargain, agreeing to plead guilty and to testify against Mr. Coleman in return for the state dropping the capital kidnaping count. Shortly thereafter, Mr. Coleman offered to plead guilty on the same terms, although he maintained his innocence. That offer was refused by the prosecution, for a variety of ostensible reasons, most of them focusing on Mr. Coleman's denial of participation in the crime. When the trial judge expressed an inclination to accept Mr. Coleman's offer, the prosecutor disqualified him from the case.

The case was then taken over by the Judge A. B. Martin, who eventually presided at trial. Shortly after Judge Martin entered the case, Mr. Coleman's then-counsel twice offered in open court to have Mr. Coleman plead guilty and admit guilt.[2] Each time the offer was refused by the prosecution. Counsel was then allowed to withdraw, new counsel was appointed, and the case went to trial.

At trial, the main evidence against Mr. Coleman was Robert Nank's testimony that he had initiated the crime and Coleman had helped him. Mr. Coleman denied any participation in the crime; he testified he was hitchhiking with Nank on the day in question, but that Nank had left him behind (because drivers would not stop

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[2]The offer was first made at a hearing at which Mr. Coleman was not present. In that hearing, defense counsel informed Judge Martin and the prosecution--falsely, we maintain--that a sodium amytal test had shown that "there was participation on his part in the crime." The offer was renewed the next day in Mr. Coleman's presence--but without any direct statement by defense counsel that Mr. Coleman had participated in the crime.

to pick up a black man) and later returned with the victim's car. The circumstantial evidence was at least equally consistent with Mr. Coleman's version of the events as it was with Mr. Nank's; but the all-white jury convicted Mr. Coleman of all three counts. On the kidnaping count, Judge Martin imposed the mandatory sentence of death by hanging.

On appeal, the Montana Supreme Court affirmed Mr. Coleman's conviction, but held that Montana's mandatory death penalty statute was unconstitutional and vacated his sentence of death. State v. Coleman, 597 P.2d 732 (Mont. 1978). The court remanded the case for resentencing, without directions.

Over Mr. Coleman's objection, Judge Martin decided to resentence him under Montana's new death penalty statute, which had been passed in 1977, three years after the crime and two years after the trial and first death sentence. That statute required the trial judge to sentence a defendant to death if one of seven enumerated aggravating circumstances existed and there were "no mitigating circumstances sufficiently substantial to call for leniency." RCM 1947 §95-2206.10 (Supp. 1977).

At the resentencing, a presentence report was prepared, but no new evidence was taken on the existence of mitigating circumstances. Instead, the trial judge used the evidence at trial to find mitigating circumstances absent, in a written order sentencing Mr. Coleman to death. The sentencing order was handed to counsel before either side presented any argument at the sentencing hearing. It gave no weight to any of a number of mitigating factors: Mr. Coleman's total lack of a criminal record at age 28; his honorable military service and his history of involvement in community service organizations; his emotional problems which had resulted in his hospitalization immediately before the crime; the lesser sentence given to Robert Nank despite his admitted participation and criminal record; and the

fact there was "practically no credible evidence connecting the defendant to the commission of the crime." State v. Coleman, 633 P.2d 624, 633 (Mont. 1981) (Morrison and Shea, JJ., dissenting).

On appeal, the Montana Supreme Court affirmed the new death sentence. Two state court petitions for postconviction relief were denied, without an evidentiary hearing. A petition for habeas corpus was similarly denied, on the Respondent's motion for summary judgment, by the United States District Court for the District of Montana.

That decision was affirmed by a panel of the Ninth Circuit, over a lengthy and strongly worded dissent. Coleman v. Risley, 839 F.2d 434 (9th Cir. 1988); Petition App. 74. Upon en banc review of that panel decision--in a opinion written by Judge Thompson, the author of the original panel majority opinion--the Court of Appeals reversed itself and unanimously[3] held Mr. Coleman's death sentence unconstitutional. Coleman v. Risley, 874 F.2d 434 (9th Cir. 1989); Petition App. 1. Its decision was limited to one of the several sentencing issues raised in the en banc petition; it held the others mooted by its order vacating Mr. Coleman's sentence of death. Petition App. 11.

REASONS FOR DENYING THE WRIT

I. THE PETITIONERS HAVE SET FORTH NO GROUND UNDER RULE 17 TO JUSTIFY GRANTING THE PETITION FOR CERTIORARI.

Mr. Coleman's case is one of first impression; in all likelihood, it is a case of last impression as well. Mr. Coleman is the only person either side has identified who is directly affected by the holding of the Court of Appeals. His case is unique; it does not meet any of the grounds for granting a writ of certiorari set out in this Court's Rule 17.

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[3]Judge Alarcon dissented from the determination of the Court of Appeals majority that, in light of its disposition of the sentencing issue, Mr. Coleman's race discrimination claim did not have to be reached. Pet. App. 58. We assume that his silence on the due process issue itself indicates his agreement with the majority on that point.

For all the hypothetical protests of Petitioners and their Amici, they do not identify a single capital case treated like Mr. Coleman's. That is because no other state court has done what Montana did here: applied a new death penalty statute to a defendant already tried and sentenced under an unconstitutional statute after the sentence imposed under the unconstitutional statute was reversed. Every other state court to confront such a situation appears to have held such retroactive application of a new statute impermissible.[4]

Nor is it likely that a state court would allow a similar aberration of due process--writing the legal rules after the trial has ended--in a noncapital case. In years of argument on this issue, no one has found even one other case where that occurred. Probably because they were so obviously unfair--and a product of a legal era where the law was in flux and extremely difficult to decipher, Lockett v. Ohio, 438 U.S. 586, 602 (1978) --the procedures followed in Mr. Coleman's case are sui generis.

This Court's Rule 17 sets forth the considerations governing review on certiorari. This case meets none of its criteria. There is no conflict between federal courts of appeals; no other federal court has faced or is likely to face this question. There is no conflict with a state court of last resort[5]--except for the Montana Supreme Court in the instant case, of course, the kind of one-to-one conflict present in every grant of the federal habeas writ.

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[4]Notably, this includes the supreme courts of several of the states appearing here as Amici. See State v. Lindquist, 589 P.2d 101 (Id. 1979); People v. Harvey, 76 Cal.App.3d 441, 142 Cal.Rptr. 887 (1978); Meller v. State, 581 P.2d 3 (Nev. 1978); State v. Rodgers, 242 S.E.2d 215 (S.C. 1978); People v. Hill, 401 N.E.2d 517 (Ill. 1980); Commonwealth v. Story, 440 A.2d 488 (Pa. 1981). See also State v. Lee, 340 So.2d 474 (Fla. 1976); State v. Collins, 370 So.2d 533 (La. 1979).

[5]Amici misspeak themselves in their string citation of cases involving "aggravating circumstances arising subsequent to conviction." Brief of Amici 10. In every one of the cases they cite, the aggravating facts were all known prior to, and placed in evidence during, a sentencing or resentencing hearing.

As discussed below, we believe the decision of the en banc Court of Appeals was plainly correct. But even if it were not, because of the unique procedural history it addressed, it is a decision ill suited for review by this Court.

II. THE DECISION OF THE EN BANC COURT OF APPEALS IS A CORRECT AND STRAIGHTFORWARD APPLICATION OF LONG-ESTABLISHED PRINCIPLES OF DUE PROCESS.

The central, unanimous holding of the Court of Appeals attacked by the Petitioners here, was this:

> The defendant is due at least that amount of process which enables him to put on a defense during trial knowing what effect such a strategy will have on the subsequent capital sentencing, the results of which may be equally if not more critical to the defendant than the conviction itself.

Petition App. 18. Petitioners never directly attack either that unexceptionable statement of the law, or its application to this case. They do not argue that Mr. Coleman had such knowledge; they do not deny the importance of such knowledge; and they do not say that deprivation of such knowledge should not violate the Due Process Clause's norms of procedural fairness.[6]

Instead, the Petitioners make three arguments: that the Court of Appeals analysis has "blurred the distinction between clauses of the Constitution" (Petition 12); that the due process principles underlying its decision constitute a "backward leap" which should be held nonretroactive "new" law under Teague v. Lane, 109 S. Ct. 1060 (1989) (Petition 13); and/or that any due process violation in this case should be held harmless (Petition 15). These arguments are both unimportant beyond the confines of this case and wrong.

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[6]Petitioners' Amici do take this tack, denigrating the interest of capital defendants in the "mere trial stratagems" of informed counsel. Brief of Amici 5. This Court's cases give more respect than Amici do to the role of defense counsel "consult[ing] with the defendant on important decisions ... in the course of the prosecution." Strickland v. Washington, 466 U.S. 668, 688 (1983).

A. The Court of Appeals Was Correct in Its Unanimous Decision That Due Process Forbids Resentencing on the Basis of Evidence Adduced at a Trial Held Under a Different Sentencing Statute.

Petitioners' main argument against the Court of Appeals' unanimous determination that Montana's application of its laws to this case violated the Due Process Clause, is that the state's actions did not violate the Ex Post Facto Clause.[7] Petition at 9-12. Plainly, this argument misses the Court of Appeals' point.

Mr. Coleman has consistently argued that his death sentence violated both clauses. However, in light of its disposition of this case on due process grounds, the Court of Appeals did not find it necessary to reach the much more difficult ex post facto issue. Petition, App. 13 n.7. Dobbert v. Florida, 432 U.S. 282 (1977) obviously would be the starting point for analyzing that issue. Mr. Dobbert, however, was both tried and sentenced under a constitutional statute. Unlike Mr. Coleman, Mr. Dobbert could not show any way in which the retroactive legislation made any substantial difference in his position, beyond providing a constitutional sentencing statute. That statute was in effect at all points in Mr. Dobbert's trial. The due process concern central to this case, therefore, played no part in Mr. Dobbert's, and the Court had no occasion to address it there.

The Ex Post Facto and the Due Process Clauses are not coextensive in all their applications. It is true that many actions with retroactive effects could be held to violate either provision. But that does not mean--as Petitioners assume--that

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[7]Petitioners' Amici take a similar approach, confounding two lines of due process decisions, to argue that the Ex Post Facto and Due Process Clauses must, in all their applications, be held coterminous. Brief of Amici Curiae at 6-8. There may or may not be merits to that argument when--as in the cases amici cite, a due process issue focuses on a change in the law after the time of the offense. But the argument makes no sense in reference to due process issues arising, like those here, changes in the law after the trial.

the converse is true, so that a retroactive action which does not violate the Ex Post Facto Clause can never violate the Due Process Clause. The exclusive focus of the Ex Post Facto Clause is on the moment "'when the crime was consummated.'" Miller v. Florida, 482 U.S. 423, 430 (1987), quoting Weaver v. Graham, 450 U.S. 24, 30 (1981); see Calder v. Bull, 3 Dall. 386, 390 (1798). The Due Process Clause has a parallel application, where a retroactive judicial change in the law deprives an individual of "fair warning that his contemplated conduct constitutes a crime." Bouie v. Columbia, 378 U.S. 347, 355 (1964). But that is certainly not the only concern of the Due Process Clause, or even its principal one. In most of its applications, the Due Process Clause looks more to "the character of the procedure which leads to the imposition of sentence" than the legal availability of "a particular result of the sentencing process." Gardner v. Florida, 430 U.S. 349, 358 (1977).

Consider this hypothetical: After both the crime and the trial in a particular case, a state, faced with a federal determination that it is constitutionally insufficient to make a conviction for a particular crime turn on proof of facts A and B, enacts a new statute which requires proof of facts A, B, and C. The defendant in that case plainly cannot claim that the statutory change is ex post facto, because the change has increased the state's burden of proof. But that defendant certainly could complain, under the Due Process Clause, if a state appellate court upheld that conviction by finding that fact C had been proved at trial--although the defendant and his counsel were never told that fact C was in issue.

Of course, that is not really a hypothetical; it is essentially this case. It is also, with slight modification, Cole v. Arkansas, 333 U.S. 196 (1948) and Presnell v. Georgia, 439 U.S. 14 (1978). It is a factual scenario which is so

obviously and fundamentally unfair that every Justice in those two cases agreed that, if established, it would violate due process. The unanimous judgment of the Court of Appeals to the same effect says nothing about the Ex Post Facto Clause, and presents no controversy sufficient to call for this Court's resolution.

B. The Decision Below Presents No Retroactivity Question.

As is the fashion this year, Petitioners argue here for the first time that Mr. Coleman is seeking the application of a "new" constitutional rule under Teague v. Lane, 109 S.Ct. 1060 (1989), which they argue should not be "retroactive" and thus should not have been considered by the Court of Appeals below. Petition 15.

Petitioners never said that in the Court of Appeals, in argument or on rehearing, although the en banc decision below postdated Teague by over two months. This petition marks the first time at any level the State has pled, argued, or suggested that Mr. Coleman's claims could not be considered in a habeas corpus action. We do not think the State should be permitted to withhold this argument until it comes to this Court. See Moore v. Zant, 57 U.S.L.W. 4399 (U.S., March 29, 1989) (dissenting opinion of Justice Blackmun). If there were a legitimate claim of nonretroactivity here, it could and should have been presented to the courts below.

But there is no real question of retroactivity in this case. Petitioners' effort to manufacture one strains credulity: its explicit argument is that Bouie v. City of Columbia, 378 U.S. 347 (1964)--decided some sixteen years before Mr. Coleman's sentence became final--should not be applied "retroactively" here. Petition 13, 14. Petitioners' complaint in this regard is confusing: its concern appears to be not that Bouie is too new, but that it is too old, so that its application to this case constitutes "an unwarranted backward leap...." Petition 14.

The due process principles that govern the Court of Appeals' decision are actually much older than Bouie. In 1948, Justice Black wrote this for a unanimous Court:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and the chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state and federal.

Cole v. Arkansas, 333 U.S. at 199. The unanimous judgment of the Court of Appeals was that the disposition of this case was "dictated by" this "[u]nderlying ... principle ...." Penry v. Lynaugh, 57 U.S.L.W. 4958, 4961, 4962 (1989), quoting Teague v. Lane, 109 S. Ct. at 1090 (original emphasis):

> Coleman was given no notice whatsoever of the life and death consequences of his actions in defending himself against the State's prosecution before and during trial. A defendant's right to notice and to fair warning of the conduct that impacts upon his liberty is a basic principle long recognized by the Supreme Court. Cf. Bouie v. City of Columbia, 378 U.S. 347, 350-51 (1964); In re Oliver, 333 U.S. 257, 273 (1948). Because Coleman had no reason to suspect that his decisions at trial would come back to haunt him at a sentencing hearing, we must conclude that he was denied due process when he was resentenced to death under Montana's revised death penalty statute.

Petition App. 18.

Petitioners' argument would reduce Teague to an absurdity: a declaration that every application of the law to a novel situation constitutes a "new rule" which cannot be applied "retroactively" to the only set of facts it will ever fit. Surely, Teague does not forbid federal habeas courts from returning in this manner to bedrock due process principles,[8] in assessing the constitutionality of aberrant state proceedings, like those in this case.

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[8]The fundamental nature of the due process principles applied here provides another reason Teague would not prohibit their application here, even if they could be called "new": Teague exempts from its rule of nonretroactivity the "bedrock procedural elements" of a fair trial, "the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty.'" 109 S.Ct. at 1076-77.

C. The Court of Appeals Correctly Found the Constitutional Error in Mr. Coleman's Case Could Not Be Found Harmless Beyond a Reasonable Doubt.

There was some disagreement among the judges of the Court of Appeals on the issue of whether the constitutional error they all found was harmless. Eight of the ten judges found that "the due process error here is not subject to harmless error analysis." Petition App. 21. Judge Trott apparently believed harmless error analysis could apply; but he was convinced that the record made "it virtually certain in my judgment that the error cannot be said to have been harmless beyond a reasonable doubt." Petition App. 57. Judge Wallace disagreed, arguing that "the record, in its present state, cannot yield an answer to the harmless error inquiry." Petition App. 29.

Though nominally adopting Judge Wallace's position, the thrust of Petitioners' argument is directly contrary to it: Petitioners' claim is that the record shows that the error, admitted arguendo, was harmless. Petition 15-17. It is not usually this Court's practice to spend its time making fact-bound harmless error determinations, Rose v. Clark, 478 U.S. 570, 583 (1986); much less is a claim of error in such a determination by a lower court a ground for granting certiorari. But even if it were, there was no error here in this regard. There is ample evidence of prejudice in the present record. Petitioners' contrary claim that there is none cannot be squared with the record, and was rejected by every judge below.[9]

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[9]Petitioners' argument focuses solely on the Court of Appeals' three examples of the most obvious decisions affected by Mr. Coleman's counsel's ignorance of the legal implications of his actions at trial, forgetting that they were just that: examples. It also misrepresents the record.

Petitioners dismiss the idea that Mr. Coleman might have disqualified the trial judge, had he known he was the sentencer, telling this Court there is no "reflection of bias against Coleman in the record." Pet. 17. The Court of Appeals knew better: Judge Martin's apparent racial bias, exemplified by his reference to the 28-year-old Mr. Coleman as "this black boy", has been a major issue throughout this case. See Pet. App. 108-9, 182-3. (continued)

The broader legal question of the amenability of this kind of error to a harmlessness evaluation was resolved in Judge Thompson's majority opinion by a faithful application of this Court's well-developed jurisprudence in this area. The majority recognized that harmless error analysis can apply to capital cases, after Satterwhite v. Texas, 108 S.Ct. 1792 (1988). Petition App. 19. It acknowledged "that the 'errors to which Chapman does not apply ... are the exception and not the rule.' Rose v. Clark, 478 U.S. 570, 578 (1986)." Petition App. 20. It then carefully considered whether this was the kind of error that could ever be determined, beyond a reasonable doubt, to be harmless, or whether the error was so pervasive that the inquiry would be "'purely speculative'". Petition App. at 18-21, quoting Satterwhite v. Texas, 108 S.Ct. at 1797.

After a detailed examination of the impact of the change in Montana law on Mr. Coleman's defense (Petition App. 15-17), the Court of Appeals majority found that a harmless error determination in this case would require such pure speculation.

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9 (cont.)

Petitioners' contention that the trial judge gave no crucial weight to the evidence of the uncharged "Roundup burglary", unknowingly interjected into the trial by defense counsel, is based on a partial quote from the trial judge's decision, taken out of context. That quote is inconsistent with the trial judge's written findings which show that it was this evidence which made the crucial difference in denying Mr. Coleman credit in mitigation. This is what the written findings said:

> The only other criminal act which appears in the trial record in this cause is the aggravated burglary of a home in Roundup, Montana, where certain guns were stolen by the defendant and Robert Nank on July 4, 1974. By reason of the foregoing, the credit in mitigation allowed by Sections 95-2206.9(1) is not appropriate to this defendant.

Pet. App. 329-30 (emphasis added).

Petitioners' simplistic suggestion as to how the question "[w]hether Coleman would have testified may be analyzed from the record", Petition at 17, shows no appreciation of the complex considerations that go into that crucial trial decision in a capital case. As Judge Trott wrote in his concurring opinion, "[a]nyone familiar with death penalty cases knows the issues confronting defense counsel highlighted by Judge Thompson are real. This is not a matter of speculation." Pet. App. 57.

> Coleman's counsel made countless tactical decisions at trial aimed solely at obtaining Coleman's acquittal, without even a hint that evidence in the record would be considered as either mitigating or aggravating factors. This due process violation had a pervasive effect on the composition of the trial record. As we have already observed, Coleman's counsel might not have called his client to testify under the new statute. He might not have brought in evidence of Coleman's prior criminal activity in his cross-examination of Nank. He might have challenged the trial judge. It would be fruitless in this case to require trial counsel to provide a record of how he or she would have handled the case differently. The error is such that no additional evidence is needed to demonstrate that the error "pervade[s] the entire proceeding." [Satterwhite v. Texas, 108 S. Ct. at 1797] .... We will not affirm Coleman's death sentence by speculating that his defense counsel might have made the same pretrial and trial decisions regardless of the sentencing scheme.

Petition App. 21.

A consideration of the mechanics of Judge Wallace's theoretically reasonable counterproposal of a remand and an evidentiary hearing, we believe, demonstrates the wisdom of the majority's decision. What would be the State's burden at such an evidentiary hearing? With respect to every tactical decision made at trial, the State would have to prove beyond a reasonable doubt that Mr. Coleman's counsel would not have done anything differently had he known that Mr. Coleman would be sentenced under a discretionary statute. Trial counsel is still alive, and could be called; but what testimony could he give? In all likelihood on most points, he and Mr. Coleman--like any defendant or defense lawyer in a similar situation--could only theorize whether they might have done things differently. To show anything beyond a reasonable doubt from such counterfactual speculation is impossible. And that speculation would potentially apply to nearly every decision made[10]--or not made, because there were no countervailing sentencing considerations to weigh--throughout the trial and pretrial proceedings in the case.

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[10]One point on which there would be little need for speculation was defense counsel's introduction of the Roundup burglary evidence. It was this point that convinced Judge Trott --who said he otherwise might agree with Judge Wallace--that it is "virtually certain ... the error cannot be said to have been harmless beyond a reasonable doubt." Pet. App. 57.

It is for this reason we believe the majority below was right, and this case is a perfect example of those exceptional situations where harmless error analysis is not possible. The pervasiveness of the impact of the error here places it in a class with the situations where this Court has found harmless error analysis most clearly useless: total denial of counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); denial of the right to self-representation, Faretta v. California, 422 U.S. 806 (1975); or conflicts of interest in defense representation, Holloway v. Arkansas, 435 U.S. 475 (1978).

But right or wrong, the Court of Appeals' analysis of this issue was sound, and opened no new territory in this well-surveyed area of harmless error jurisprudence. The precise question it answered is unlikely to be raised again, as the constitutional error to which it applies will probably never recur. There is no good reason to grant certiorari to reexamine this question.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TIMOTHY K. FORD
HENRY T. GREELY
CHARLES F. MOSES

ATTORNEYS FOR RESPONDENT

September 29, 1989.

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[11] Citing Judge Alarcon's separate opinion, Petitioners make a final argument that the Court of Appeals' directions for disposition of the case on remand were unclear or erroneous. Petition 19-20. They do not even make a pretext of an argument that this aspect of the decision below presents an issue worthy of review under Rule 17. If Petitioners' had questions about the basis for, or nature of, the Court of Appeals' remand order, those should have been raised in that court in a motion for reconsideration or clarification; it is not a matter which, by any test, warrants this Court's time and attention.